IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 302

DISTRICT OF COLUMBIA, *Petitioner*,

vs.

GERALDINE LITTLE, alias MILDRED PARKER,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE

JOHN P. MCGRATH,
Corporation Counsel, New York, New York.
RAY L. CHESEBRO,
City Attorney, Los Angeles, California.
BENJAMIN S. ADAMOWSKI,
Corporation Counsel, Chicago, Illinois.
ALEXANDER G. BROWN,
City Attorney, Portland, Oregon.
CHARLES S. RHYNE,
730 Jackson Place, N. W., Washington, D. C.

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 302

DISTRICT OF COLUMBIA, *Petitioner*,

vs.

GERALDINE LITTLE, alias MILDRED PARKER,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE

STATEMENT

The petition for certiorari in this case seeks review of a final judgment of the United States Court of Appeals for the District of Columbia Circuit in *District of Columbia* v. *Geraldine Little, Alias Mildred Parker*, —— Fed. (2d) ——, No. 10092 (1949), affirming the judgment of the Municipal Court of Appeals for the District of Columbia, holding an inspection of a private dwelling by a health officer without a warrant unconstitutional.

FACTS OF THE CASE

The case involves the constitutionality of an inspection of a private dwelling by a health inspector without first securing a search warrant.

On complaint, to the Health Department by an occupant of residential property belonging to Respondent that there was an accumulation of loose and uncovered garbage and trash in the halls of the premises, and that persons residing therein were not availing themselves of the toilet facilities, a uniformed inspector of the Health Department, accompanied by a uniformed member of the metropolitan police, went to the residence to inspect it. Respondent refused to allow the inspection and was arrested for hindering, obstructing and interfering with an inspector of the Health Department in the performance of his duty.

The Respondent was convicted in the trial court but on appeal to the Municipal Court of Appeals for the District of Columbia the conviction was reversed. The United States Court of Appeals for the District of Columbia affirmed, holding that this inspection of a private dwelling by a health inspector, without a warrant, was unconstitutional under the Fourth Amendment to the Constitution of the United States, and that a government official could not invade a private home unless a magistrate had authorized him to do so, or, an immediate crisis in the performance of duty afforded neither time nor opportunity to apply to a magistrate. Judge Holtzoff dissented, contending that the Fourth Amendment related only to criminal or quasi-criminal actions.

IMPORTANCE OF THE CONSTITUTIONAL ISSUE PRESENTED

The question of the constitutionality of inspections of private dwellings by health inspectors without search warrants is of vital importance to thousands of municipalities throughout the United States. This brief in support of the petition for certiorari herein is filed on behalf of the 529 member cities of the National Institute of Municipal Law Officers and the millions of local citizens resident therein.

Today the problems of health in our municipalities are being studied and regulated extensively. The primary effort is to prevent the spread of disease in both mind and body, while the secondary effort is to correct those conditions already in existence, which are spreading disease. The thousands of municipalities and their resident citizens are vitally interested in these preventive and corrective methods and in their ultimate purpose, which is to make each community a healthier place in which to live and raise families.

Prior to the decision of the Court of Appeals it was generally recognized that the police power was the power to prevent and anticipate dangers, not merely the institution of corrective measures after conditions have resulted in an emergency situation or a crisis has arisen.

The decision of the Court below in requiring all inspections of private dwellings for health purposes, unless there is an actual known emergency, to be premised on application to and receipt from a magistrate of a search warrant, has the practical result of completely destroying the preventive powers of the Health Department. First of all there is not, nor has there ever been provided, a search warrant such as is required by that Court, and secondly, if such warrant were provided by the Congress, in the overwhelming majority of instances it would be impossible for the health inspector to make any showing of probable cause, and therefore the warrant would not be issued.

It is respectfully submitted that the Court of Appeals fell into error in reaching the result it did. There has never been in the entire history of the common law or statutory law, a requirement of a search warrant for such a purpose, nor has the Fourth Amendment ever been held applicable to any actions other than those that were criminal or quasi-criminal in nature.

It is not to be denied that the fundamental purpose of the Fourth Amendment was to secure the privacy of the home. However, it is also not to be denied that under the police power there is interference, in many respects, with the liberty of individuals, their right to move around and their right to use their property. Individual freedom must yield to the enforcement of reasonable regulations for the public welfare. This interference with the individual and his rights has been justified because it has been recognized that it is necessary in order to protect the personal and property rights of others and to advance the best interests of society. It is respectfully submitted that it was never the intended purpose of the Fourth Amendment to govern health inspections and the Fourth Amendment should not be expanded to that point.

It is recognized that the Fourth Amendment to the Constitution of the United States is not applicable to the states; however, every state constitution contains a similar provision. In view of this and the circumstances created by this case, and since apparently this precise issue has never before been presented to any court, it is respectfully submitted that certiorari be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

ARGUMENT

I. A Municipality May, in the Exercise of Its Police Power, Enforce Local Police, Sanitary and Other Regulations Designed to Promote the Health, Safety and Welfare of Its Citizens

It has consistently been held that one of the chief purposes of a municipal government is the conservation of the public health and that public authorities may employ all necessary means to protect the public health and as a result may provide for inspections of private dwellings as a health measure. 3 McQUILLIN, MUNICIPAL CORPORATIONS, Section 954 (1943).

It has been recognized that garbage accumulates rapidly and is a constant threat to the health of the public in general. *Dupont* v. *District of Columbia*, 20 App. D. C. 478 (1902). This Court said in *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306, at page 321:

> "It is the duty, primarily of a person on whose premises are garbage and refuse material to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them or allow them to be kept in such condition as to create disease."

It is evident that this Court has recognized that garbage is a menace to society and that under a reasonable exercise of the police power the owners of private dwellings are subject to having their dwellings inspected for the purpose of preventing the spread of disease.

A. THE POWER TO MAKE THE INSPECTION IN THIS CASE WAS A LAWFUL DELEGATION OF POWER BY THE CONGRESS OF THE UNITED STATES AND THE INSPECTION WAS A REASONABLE EXERCISE OF THIS POWER

The Constitution of the United States, Article I, Section 8, Clause 17, provides that Congress shall exercise exclusive

jurisdiction over the District of Columbia. Pursuant to this a joint resolution of Congress authorized the Commissioners of the District of Columbia to make and enforce reasonable and usual police regulations for the protection of the "lives, limbs, and health" of all persons within the District of Columbia. 27 Stat. 394, Res. No. 4, Sec. 2 (1892), Title 1-226, D. C. Code (1940).

By virtue of this authority the Commissioners passed Regulations Concerning the Use and Occupancy of Buildings and Grounds, providing that it is the duty of every person occupying premises in the District of Columbia to keep them in a clean and wholesome condition and if upon inspection they are not in such condition the occupant is to be so notified and is to place them in a clean and wholesome condition. It further provides that any person violating provisions of the regulations or interfering or preventing an authorized inspection is guilty of a misdemeanor. The Respondent was convicted of interfering and preventing an authorized inspection.

It is submitted that this attempted inspection was a reasonable exercise of the power granted. The Complaint to the Health Department was allegedly based upon personal knowledge, the attempted inspection was made by a uniformed inspector at a reasonable time of day, and the Respondent knew of the purpose of the visit.

II. An Inspection for Health Purposes Is Not a Search Within the Meaning of That Term in the Fourth Amendment

The word "search" has been defined as follows:

> "the term search as applied to search and seizures is an examination of a man's house or other buildings or premises with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged." 56 Corpus Juris Search and Seizure, Section 1.

In this case the inspector was not going to look for evidence of guilt to be used in the prosecution of any criminal action, but was merely intending to look at the conditions of the house from a health viewpoint. If the house was found to be clean and wholesome, nothing further would be done and if it was found to be unclean and unwholesome Respondent would have been notified, with time being given to correct the situation. The purpose of the inspection is not in any way criminal or quasi-criminal in nature.

III. Search Warrants Authorizing Health Inspections Are Not in Existence, Nor Have They Ever Been in Existence

Search warrants were not known to early common law. Originally they were exclusively used for the discovery of stolen property but have now been extended to searches for other criminal evidence. However, there is no existing statute under which a health inspector may obtain a warrant authorizing an inspection to determine whether premises are clean and wholesome.

A search warrant is generally defined as a warrant requiring the officer to whom it is addressed to search a house, or other place, therein specified, for stolen or other personal property, and bring it before a magistrate. 56 CORPUS JURIS SEARCH AND SEIZURE, Section 3; BOUVIER'S DICTIONARY.

Search warrants have generally been considered legal criminal process. The common law recognized them as having no relation to civil proc dings and therefore held them not to be available in those proceedings. 56 CORPUS JURIS SEARCH AND SEIZURE, Section 71. Furthermore, this Court has held that the primary purpose of a warrant is the detection of crime by obtaining evidence for criminal prosecutions but that the warrant could not be used as the sole means of securing that evidence. *Gouled* v. *U. S.*, 255 U. S. 298,

In view of the Court of Appeals' decision in requiring a warrant, when there is no emergency, since there is no such

warrant known to the law, it should be evident that the great preventive powers of the Health Department are destroyed, resulting in placing the public health, safety and welfare in great jeopardy. It is respectfully submitted that even if warrants were provided that many of the important preventive powers would remain inoperative. Many necessary inspections made by the Health Department are routine ones to determine whether health regulations are being observed. In none of these would the health inspector be able to show probable cause and therefore the warrants would not be issued.

In view of the fact that an inspection for health purposes is not a search within the meaning of that term in the Fourth Amendment and since there is no warrant known to law applicable to health inspections, it is respectfully submitted that the District of Columbia, through its Health Department, may provide for inspections of private dwellings in an effort to prevent the spread of disease, and that this is a reasonable exercise of the police power.

IV. The Fourth Amendment Applies Only to Criminal or Quasi-Criminal Actions

A. Cases Relied on by the Majority of the Court of Appeals Are Not Applicable in This Type of Case

The majority opinion in the Court of Appeals refused to hold that the Fourth Amendment related only to criminal or quasi-criminal cases, yet every case cited was a criminal case.

That Court in its footnote 5 cited *Agnello* v. *U. S.*, 269 U. S. 20, a criminal case concerning the sale of narcotics and introduction into evidence of incriminating articles discovered in an unlawful search. Also cited there were *Harris* v. *U. S.*, 331 U. S. 145; *Davis* v. *U. S.*, 328 U. S. 582; *Johnson* v. *U. S.*, 333 U. S. 10; *McDonald* v. *U. S.*, 17 U.S.L.W. 4045 (1948); *Wolf* v. *Colorado*, 17 U.S.L.W. 4638 (1948), all cases concerning criminal actions.

The Court of Appeals said,

> "to be certain we have stated the rule no broader than existing law, one has only to read the cases cited *supra* in footnote 5; indeed the opinions in *McDonald* v. *U. S.* alone are sufficient."

However, as stated above, the *McDonald* case involved a criminal action. It was held in that case that convictions of carrying on a lottery known as the numbers game should be reversed because the police officers, without a warrant, broke into a rooming house and seized certain evidence, thereby violating the Fourth Amendment.

It is respectfully submitted that the above decisions of this Court are not controlling, because here there is merely involved an administrative function of the Health Department, the attempt to prevent the spread of disease, having none of the criminal aspects of the above cases.

B. The Historical Background of the Fourth Amendment Plainly Indicates That It Was Intended to Cover Only Criminal and Quasi-Criminal Actions

The Fourth Amendment does not prohibit all searches but only those that are *unreasonable*, and to determine what is an unreasonable search and seizure it is necessary to determine what was considered unreasonable when the Fourth Amendment was adopted. *Carroll* v. *U. S.*, 267 U. S. 132; *Knowlton* v. *Moore*, 178 U. S. 41; *Harris* v. *U. S.*, 151 Fed. (2d) 837 (C.C.A. 10th).

It has generally been conceded that the case of *Entick* v. *Carrington*, 19 Howells' State Trials 1030 (1765) was the basis for the Fourth Amendment. That was the English case which condemned the use of general warrants and writs of assistance, empowering officers to enter private homes and intrude on the privacy of citizens, to seize private papers and property for the purpose of personal prosecution on any charges the Crown might choose to make. Indeed this Court has recognized the above case as explanatory of

what was meant by an unreasonable search and seizure. In commenting on this case, this Court has said,

> "As every American Statesman during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution and were considered as sufficiently explanatory of what was meant by unreasonable search and seizures." *Boyd* v. *U. S.*, 116 U. S. 616, at page 626.

As originally adopted and ratified by the States, the Constitution of the United States contained no "Bill of Rights." On the insistence of the states, Mr. James Madison presented them to the First Session of the First Congress on June 8, 1789 with the intent of placing the freedom of speech, press, religion, the security of property, personal liberty, trial by jury and other fundamental rights beyond the reach of the Government.

Very indicative of the framers' viewpoint, on the purpose of the now Fourth Amendment, is the manner and order in which it was first presented to Congress. Mr. Madison read the "Bill of Rights" for the first time to Congress partly in this order:

> "No person shall be subject, except in the cases of impeachment, to more than one punishment or trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.
>
> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"The rights of the people to be secured in their persons, their houses, their property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the person or things to be seized.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." Annals of Congress, First Session, 434 (1789).

When the Amendments were agreed to by the First Congress they were presented in the same order and the now Fourth Amendment was accepted with the only debate being on changing the word "secured" to "secure." Annals of Congress, *supra*, p. 753.

It is very important to note that the "unreasonable search and seizure" provision is not found with the provisions for "freedom of speech, press or religion," but was placed by Mr. Madison with the provisions of a criminal nature, directly between the provisions for "excessive bail" and the "right of an accused to a speedy trial." While not conclusive of the purpose intended it is submitted that this is very strong evidence that the framer intended this provision to apply only to criminal actions.

In view of the fact that the framer of the Fourth Amendment apparently intended it to cover only criminal actions, and the purpose of the Amendment was to prevent general warrants, which were used only for criminal prosecutions, and since there have never been any provisions for the type of warrants required by the Court of Appeals, it is respectfully submitted that it is shown, by historical background, that the Fourth Amendment was intended to apply only to criminal or quasi-criminal actions.

C. THIS COURT HAS RECOGNIZED THAT THE FOURTH AMENDMENT DOES NOT APPLY TO CIVIL ACTIONS

In the case of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, this Court speaking through Mr. Justice *Curtis* said at p. 285,

> "The remaining objection to this warrant is, that it was issued without support of an oath or affirmation, and so was forbidden by the fourth article of the Amendments to the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part."

In the case of *Boyd* v. *U. S.*, *supra*, this Court after an excellent discussion of the historical background of the Fourth Amendment said at p. 633,

> "Reverting then to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth."

In discussing the relationship between the Fourth and Fifth Amendments, this Court said further at p. 633,

> "We have already noticed the intimate relationship between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the Fourth Amendment.

> And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think that it is within the clear intent and meaning of those terms. We are also of the opinion the proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."

Again, this Court said at p. 634,

> "As therefore, suits for penalties and forfeitures incurred by the commission of offences against the law are of this quasi-criminal nature, we think they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment and that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

It should be apparent from the above that this Court has recognized that the Fourth Amendment is applicable only in criminal or quasi-criminal actions and that it has no application to civil actions.

D. There Are District Court Decisions Holding That the Fourth Amendment Is Not Applicable to Civil Actions

In the case of *In re Meador*, 16 Fed. Cas. 1294 (Case No. 9,375, N. D. Ga. 1869) in answer to argument that the Fourth Amendment did not allow an Internal Revenue Inspector to require persons to come before him and produce their books for his inspection, the court said at p. 1299:

> "But this is a civil proceeding, and in no wise does it partake of the character of a criminal prosecution; no offence is charged against the Meadors. Therefore, in this proceeding, the Fourth Amendment is not violated. Said Merrick, J., in pronouncing the judgment

> of the court in *Robinson* v. *Richardson*, 13 Gray 454: 'Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings . . . but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals.' "

In the case of *In re Strause*, 23 Fed. Cas. 261 (Case No. 13,548, D. Nev. 1871) the court said at p. 261-262,

> "Upon the second ground that this requirement is an unreasonable search, it need only be remarked that the Fourth Amendment, supposed to be violated, like the Fifth referred to above, is applicable to criminal cases only."

In *U. S.* v. *Three Tons of Coal*, 28 Fed. Cas. 149 (Case No. 16,515, E. D. Wisc. 1875) the court held that a proceeding against a distillery for forfeiture under the revenue laws, was not a criminal proceeding within the meaning of the Fourth and Fifth Amendments.

In the case of *U. S.* v. *First National Bank of Mobile*, 295 Fed. 142 (S. D. Ala., 1924) the Court held that a bank having books and records necessary to ascertain the income returns of a taxpayer was not protected by the Fourth Amendment. The court said at p. 143:

> "Said bank refuses to testify and produce the books and contends that it is protected by the Fourth Amendment to the Constitution from so doing. As I understand the Fourth Amendment, it protects the parties to criminal prosecutions against unreasonable searches and seizure of their papers . . ."

In a case under the Food and Drug Act, *U. S.* v. *18 Cases of Tuna*, 5 Fed. (2d) 279 (W. D. Va. 1925) the court held that an attachment, not supported by oath or affirmation, in forfeiture proceedings, was constitutional, and that the Fourth Amendment did not apply to the issuance of a writ of attachment in forfeiture cases.

In *Camden County Beverage Co.* v. *Blair*, 46 Fed. (2d) 648 (D. N. J. 1930), a case where prohibition agents broke and entered the plant of complainant and seized certain evidence, the court held that this evidence was only to be used to revoke complainant's license, a thing strictly civil in nature, and therefore, was not within the Fourth and Fifth Amendments.

In a libel proceeding under the Food and Drug Act, *U. S.* v. *62 Packages, etc.*, 48 Fed. Supp. 878 (W. D. Wisc. 1943), the court said at page 884:

> "The Fourth Amendment to the United States Constitution does not apply to seizure process in civil actions. The sections of the Act here in question do not provide for unreasonable searches and seizures. This is a civil action as distinguished from a criminal action."

See also *U. S.* v. *75 Cases, etc.*, 146 Fed. (2d) 124 (C.C.A. 4th, 1944); *U. S.* v. *935 Cases, etc.*, 136 Fed. (2d) 523 (C.C.A. 6th, 1943).

From the cases cited above it is evident that the District courts confronted with this issue have consistently held the Fourth Amendment to be inapplicable in non-criminal proceedings.

E. In the Only State Court Decisions Found on This Subject, the Courts Held That Health Inspections Did Not Violate the State Constitutional Provisions Against Unreasonable Search and Seizures

In the case of *Hubbell* v. *Higgins*, 148 Iowa 36, 176 N. W. 914 (1910), the court held that it was not repugnant to the state constitutional provision against unreasonable search and seizures, to allow a health inspector to inspect a hotel,

without a warrant, to ascertain whether the hotel was in a clean and sanitary condition. The Court said, at p. 46:

> "The right of the legislature to provide for inspection of premises in the interest of public safety and welfare, may be provided for and carried on without the need of a search warrant."

In the only other state court decision found on this subject, *Safee* v. *City of Buffalo*, 204 App. Div. 561, 198 N. Y. S. 646 (1923), in answer to argument that the City of Buffalo's ordinance providing for inspections of all premises where a refreshment business was carried on, to determine whether laws and ordinances relating to the public health and safety were being complied with, the court stated:

> "It is urged that these provisions are in conflict with the search and seizure clause of the Bill of Rights. But that clause is designed to protect the individual in the sanctity of his home and the privacy of his books, papers and property, and has no application to reasonable rules and regulations adopted to protect public health, morals and welfare . . . Having in mind the end to be accomplished, it may not be said that those means are unreasonable."

CONCLUSION

In view of the importance of the constitutional issue presented here to thousands of municipalities vitally interested in the preventive aspect of correcting their health problems, it is respectfully submitted that the dissenting opinion of Judge *Holtzoff* in the Court of Appeals correctly states the applicable law in this case, and that the decision in this case should be reviewed and re-examined by this Court. The imperative character and national importance of this problem stresses the need for this Court's determination of the issue presented.

Respectfully submitted,

JOHN P. MCGRATH,
Corporation Counsel, New York, New York.

RAY L. CHESEBRO,
City Attorney, Los Angeles, California.

BENJAMIN S. ADAMOWSKI,
Corporation Counsel, Chicago, Illinois.

ALEXANDER G. BROWN,
City Attorney, Portland, Oregon.

CHARLES S. RHYNE,
730 Jackson Place, N. W., Washington, D. C.